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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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GREENBLUM & BERNSTEIN, P.L.C.
1950 ROLAND CLARKE PLACE
RESTON, VA 20191

EXAMINER	
JEAN-LOUIS, SAMIRA JM	
ART UNIT	PAPER NUMBER
1627	

NOTIFICATION DATE	DELIVERY MODE
07/22/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

gbpatent@gbpatent.com
pto@gbpatent.com

Office Action Summary	Application No.	Applicant(s)	
	10/759,160	KOHLHASE ET AL.	
	Examiner	Art Unit	
	SAMIRA JEAN-LOUIS	1627	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *18 June 2010*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *78-136* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☒ Claim(s) *120,126-128,131,133,135 and 136* is/are allowed.

6)☐ Claim(s) _____ is/are rejected.

7)☒ Claim(s) *119, 121-125, 129-130, 132, and 134* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Continuation Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 06/18/10 has been entered.

DETAILED ACTION

Response to Arguments

This Office Action is in response to the amendment submitted on 06/18/10. Claims 78-136 are currently pending in the application, with claims 1-77 having being cancelled. Accordingly, claims 78-136 are being examined on the merits herein.

Receipt of the aforementioned amended claims is acknowledged and has been entered. The Examiner further submits that the arguments set forth in the Examiner's Answer filed on 01/08/09 and the Final rejection mailed on 04/16/09 are incorporated by reference herein. As for applicant's Reply brief filed on 03/09/09, the Examiner acknowledges receipt of such reply. However, given that these issues were already addressed in the Final rejection and/or the Examiner's Answer, these arguments are also incorporated by reference herein.

Applicant's argument with respect to amended claims 119-120, 123, 128, and 135 has been fully considered. However such arguments are not found persuasive as applicant is arguing features not previously presented. It is noted that the features upon which applicant relies (i.e., wherein the composition is free of mono- and di-fatty acid esters of glycerol and glycol) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Consequently, applicant's arguments are moot. However, given that applicant has amended the claims the rejections of record are hereby withdrawn.

For the foregoing reasons, the rejections of record were indeed proper. However, in view of applicant's amendment, the following modified 103 (a) Non-Final rejection is being made.

Claim Rejections - 35 USC § 103

It is respectfully pointed out that the recitation "pearlescent" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural

limitations are able to stand alone. See In re Hirao, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and Kropa v. Robbie, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 78-118 are rejected under 35 U.S.C. 103 (a) as being unpatentable over Riedel et al. (U.S. 6,558,680 B1, previously cited) in view of Charlton et al. (U.S. 6,486,106 B1, previously cited).

Riedel et al. teach cosmetic or dermatological compositions containing fatty acids, fatty alcohols, non-polar lipids and ethoxylated fatty acid esters (see abstract). In addition, Riedel teaches that such composition can comprise auxiliaries and/or additives such as surfactants (i.e. laureth-4, instant claims 78, 85, 102, and 108; see column 9, line 15, and lines 17- 38; column 11, lines 14-24), and other usual constituents of cosmetic or dermatological formulations, such as polymers (see column 11, lines 14-24). Riedel also teaches that such a composition can also comprise emulsifiers such as acrylate/C10_30-alkyl acrylate cross polymer which is conventionally known in the art as an associative polymer (see column 8, lines 58-59, which meets the limitations of instant claims 78-79, and 98-99), cetyl dimethicone (i.e. trade name Abil Wax 9840)

conventionally known in the art as a siloxane elastomer (see table 1, which meets the limitations of instant claims 78-79), PEG-40 hydrogenated castor oil conventionally known in the art as a solubilizer (see column 9, line 5, which meets the limitations of instant claims 115-116), mixtures of emulsifiers containing PEG 30 stearate, or PEG 40 stearate or PEG 100 stearate (instant claims 84 and 102; see col. 9, lines 13 and 18) and ethanol (see column 6, line 65) and further teaches that the composition can be formulated as a skin protection cream, cleansing milk, sunscreen lotion or as a decorative cosmetic (see column 10, lines 1-7, which meets the limitation of claims 78-79). Moreover, Riedel teaches the use of both amphiphilic polymers (i.e. polyglycerol 3-dihydroxystearate, also known in the art as Cremophor) and associative polymers such as acrylate/C10-30 alkyl acrylate cross polymer in his compositions (see col. 8, lines 37-65). Importantly, the composition of Riedel et al. specifically discloses the fatty acids stearic and palmitic (instant claims 80, 86, and 102-103) as a preferred embodiment of the invention including the use of the fatty alcohol cetearyl alcohol and the silicone oil cyclomethicone (instant claims 78-79, 81, 87, 102-103, 110, and 113; see example 8).

Riedel et al. do not teach the specific amphiphilic polymer, acrylate/vinyl isodecanoate crossprolymer, recited in claims 82, 88, and 102-103). Similarly, Riedel et al. do not specifically teach a skin care composition entailing the addition of component (IV) of at least one of sodium hydroxide and potassium hydroxide.

Charlton et al. teach a skin wash composition (i.e. dermatological composition) containing 0.1-0.5% stabilizing agents such as the amphiphilic polymer Stabylen 30 (or acrylate/vinyl isodecanoate crossprolymer; instant claims 82, 88, and 102-103; see col. 4, lines 20-23). Charlton et al. further teach the addition of 2-5% PEG 150 distearate or PEG 55 propylene glycol oleate as thickeners (see col. 4, lines 41-49) in the skin wash composition. Charlton et al. also teach the use of neutralizing agents such as sodium hydroxide to neutralize the composition and control the pH of the composition (see column 3, lines 1-12; which meets the limitations of instant claims 78-79, 83, 89, and 102-105).

Thus, to one of ordinary skill in the art at the time of the invention would have found it obvious to add sodium hydroxide to the modified composition of Riedel in order to neutralize such cosmetic and dermatological composition given that such composition may necessitate pH control as taught by Charlton et al. Given that Riedel teach a cosmetic and dermatological composition of fatty acids, fatty alcohol, ethoxylated esters, surfactant (such as laureth-2), and non-polar lipids, and Charlton et al. disclose that sodium hydroxide can be used as a neutralizing agent, one of ordinary skill would have been motivated to add the sodium hydroxide of Charlton to the composition of Riedel with the expectation of adjusting the pH level of the composition in the absence of evidence to the contrary. Thus, claims 78-79, 83, 89, and 102-105, are prima facie obvious over the teachings of Riedel in view of Charlton.

Similarly, it would have been obvious to one of ordinary skill in the art to incorporate Stabylen 30 and PEG 150 distearate or PEG 55 propylene glycol oleate since Charlton et al. teach the inclusion of both Stabylen 30 as a stabilizer (i.e. amphiphilic polymer) along with PEG 55 propylene glycol oleate (or PEG 150 distearate) as stabilizers in his dermatological composition. Given that Riedel teaches a cosmetic and dermatological composition of fatty acids, fatty alcohol, ethoxylated esters, surfactant (such as laureth-2), and non-polar lipids, and given that Charlton et al. teach the inclusion of both amphiphilic polymers and associative polymers in dermatological compositions and that sodium hydroxide can be used as a neutralizing agent, one of ordinary skill would have been motivated to incorporate the amphiphilic and associative polymers for stabilizing and thickening purposes as disclosed by Charlton et al. and neutralize the composition of Riedel et al. with sodium hydroxide with the reasonable expectation of providing a stable dermatological composition.

Regarding the term "substantially free" recited in claim 79, the Examiner contends that such terminology is being considered as a broad term. In view of the lack of guidance in the specification and given that applicant did not point out the critical limitation encompassed by such term, the Examiner is interpreting such term to mean that a range of 0.2-10% mono- and di-fatty acid esters of glycerol and glycol in a composition is substantially free of the aforementioned fatty acid esters.

Moreover, while the exact percentage of the ingredients are not disclosed by

Riedel, it is generally noted that differences in concentration, ranges or percentages do not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454,456, 105 USPQ 233, 235 (CCPA 1955). Given that applicant did not point out the criticality of specific ranges or percentages of the invention, it is concluded that the normal desire of scientists or artisans to improve upon what is already generally known would provide the motivation to determine where in a disclosed set of percentage or ranges is the optimum combination of percentages.

Regarding the saponification of the fatty acids as recited in claims 106-107, it is considered that one of ordinary skill in the art at the time of the invention was made would found it obvious to conclude that the composition of Riedel would possess the same percentage of saponified fatty acids as that disclosed by the applicant given that these compositions both entail the same ingredients. As a result, one of ordinary skill in the art would have expected that these ingredients would not lead to no more than 9% of saponified fatty acid acids.

It is further noted that In re Best,195 USPQ 430, and In re Fitz.gerald~ 205 USPQ 594, discuss the support of rejections wherein the prior art discloses subject matter which there is reason to believe inherently includes functions that are newly cited or is

identical to a product instantly claimed. In such a situation the burden is shifted to the applicants to "prove that subject matter shown to be in the prior art does not possess characteristic relied on" (205 USPQ 594, second column, first full paragraph).

Objections

Claims 119, 121-125, 129-130, 132, and 134 are objected to because of the following informalities: Claims are dependent upon rejected claims. Applicant is required to incorporate all of the limitations of the independent claims into the aforementioned claims. Appropriate correction is required.

Conclusion

Claims 120, 126-128, 131, 133, and 135-136 are allowed while claims 78-118 are not allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Samira Jean-Louis whose telephone number is 571-270-3503. The examiner can normally be reached on 7:30-6 PM EST M-Th.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/S. J. L. /

Examiner, Art Unit 1627

07/17/2010

/SREENI PADMANABHAN/

Supervisory Patent Examiner, Art Unit 1627